

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 23, 2010

ROBERT KEITH v. CHERYL KEITH

**Appeal from the Chancery Court for Rhea County
No. 9149 Jeffrey F. Stewart, Chancellor**

No. E2009-02201-COA-R3-CV - MARCH 30, 2010

Cheryl Keith (“Wife”) initiated this post-divorce case by filing a petition for contempt that included allegations of nonpayment of alimony and other claims against her former spouse, Robert Keith (“Husband”). By way of a counterclaim, Husband sought termination or modification of the periodic alimony previously awarded to Wife. The trial court found that Husband was in arrears in his alimony obligation and awarded Wife a judgment for \$8,000. The trial court further found a material change of circumstances and reduced Husband’s periodic alimony obligation. Husband appeals, contending that the trial court erred in failing to terminate the alimony award. We conclude that the evidence does not preponderate against the trial court’s modification of the alimony award. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the Court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

Larry G. Roddy, Dayton, Tennessee, for the appellant, Robert Keith.

Carol Ann Barron, Dayton, Tennessee, for the appellee, Cheryl Keith.

OPINION

I.

In February, 1999, Husband and Wife were divorced after a lengthy marriage.¹ In addition to stipulating grounds for divorce, the parties resolved all remaining issues, including the division of all marital assets and debts, in a settlement agreement that the trial court incorporated into the final divorce judgment. As relevant to the instant case, the judgment ordered Husband to pay Wife \$200 a week in periodic alimony.

In February 2009, ten years after their divorce, Wife filed a petition for contempt which alleged that since entry of the divorce judgment, Husband had “willfully and intentionally failed to pay said alimony. . . .” In his answer and counterclaim, Husband asserted that he had paid alimony as ordered for over ten years, but sought to have “the alimony award . . . terminated or at least modified” based on a material change in circumstances. A bench trial on the petition was held on May 27, 2009.

Husband was the sole wage earner during the marriage. He had worked for La-Z-Boy furniture company for nearly 34 years with a perfect attendance record. In July 2008, he was fired for incurring a second, secondary safety violation that year after he “left the handbrake loose when he exited a forklift.” Husband was denied unemployment benefits and his appeal was dismissed as untimely. When the parties divorced, Husband earned about \$50,000 a year. At the time of his dismissal, his hours had been cut and Husband was earning between \$25,000 - \$30,000 a year. He was out of work for the next seven to eight months. Up until his termination, Husband’s alimony payments had been deduced automatically from his paychecks and sent to Wife. After he lost his job, Husband lived on about \$2,000 in savings and worked a few “odd jobs.” Husband had remarried after the parties’ divorce, and his new wife was employed and helped maintain their household.

In April 2009, Husband began working as a contract employee for a security services company. He worked 12-hour shifts patrolling a housing subdivision at night. At the time of trial, Husband earned \$81 a day and worked six days a week, for a gross income of some \$972 every two weeks. Husband noted that he was initially hired to work three to four days a week, but received more shifts after another employee was hospitalized. Husband testified that he was unsure as to whether full-time work would continue to be available to him after the sick employee returned to work. Three years before the trial, Husband’s father died and left Husband a \$17,000 inheritance. Husband said that he had purchased two cars with the money and that it was not available for him to pay his living expenses when he later lost his job.

¹The record does not reflect the marriage date, but comments made by the trial court in its bench ruling indicate that the parties were married for 24 years.

Wife was primarily a stay-at-home spouse throughout the marriage, but had worked at times when she and Husband needed extra money to make ends meet. After the divorce, a female friend of Wife's moved in with her. The girlfriend was disabled and received \$400 a month in disability benefits. According to Wife, the girlfriend supported herself with her disability check and food stamps she received. When the girlfriend was able, she helped with a portion of the utility bills or occasionally bought dinner. Wife also invited the girlfriend's two adult children and their families to live with her. The girlfriend's adult son did not work, but his wife held jobs at various fast food restaurants. Their family moved out of Wife's home the month before the trial. The girlfriend's adult daughter stayed home with her three children while her fiance worked.

Wife's girlfriend died in the summer of 2008. At the time of trial, Wife lived with her deceased girlfriend's adult daughter, the daughter's fiance, and their three young children. The daughter's and her fiance's contribution toward household expenses was, according to Wife, "just pretty much keeping lights and water going, and that's about it." Wife explained that until Husband resumed paying her spousal support, she was dependent on the couple to pay the two utility bills. In return, Wife helped watch the couple's children.

Wife testified that Husband had agreed to support her following the divorce, and she had no other source of income – no job, no unemployment benefits, and no social security disability or other benefits. Wife no longer had a phone or internet service because she could not afford the services. Wife's estimated living expenses included her utility bills of \$250 per month, \$100 in food per month for herself, and another \$100 a month for prescription medications, gas, toiletries and personal miscellaneous expenses. While the mortgage on the marital home awarded to Wife in the divorce had been paid in full, Wife was responsible for some \$400 in property taxes annually. Wife was able to purchase a car for herself a few years before the trial with money she received following her mother's death.

Wife had no prospects for marriage at the time of the trial. She described herself as "partially" disabled, but she had never applied for disability benefits. She conceded she had no real excuse for not seeking disability benefits, but explained that she was able to "get by" on the alimony she had received. Wife was diabetic and suffered from nerve damage, especially to her feet, since 1995. Wife had not worked outside the home in the ten years since the parties' divorce, and had not applied for a job until after Husband lost his job and stopped paying alimony for the past ten months through May 2009. At the time of trial, Husband was \$8,000 in arrears on his alimony obligation.

At the conclusion of the trial, the court regarding alimony found as follows:

[Wife] shall have a judgment against [Husband] for alimony

arrears through the end of May, 2009 in the amount of \$8,000.00; that the value of the tractor in the amount of \$300.00 shall be a credit toward the alimony arrears; that based upon a material change in the wages of [Husband] his alimony obligation shall be reduced to \$100.00 per week; additionally that [Husband] shall pay \$100.00 per week on the arrears until fully satisfied; that each party shall be responsible for their own attorney fees.

Upon the denial of his motion for new trial, Husband filed a timely notice of appeal.

II.

Husband presents one issue for our consideration which we restate for clarity as follows:

Whether the evidence preponderates against the trial court's decision to reduce rather than terminate the award of periodic alimony.

III.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); **Wright v. City of Knoxville**, 898 S.W.2d 177, 181 (Tenn. 1995). "Because modification of a spousal support award is 'factually driven and calls for a careful balancing of numerous factors,' **Cranford v. Cranford**, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989), a trial court's decision to modify support payments is given 'wide latitude' within its range of discretion, *see Sannella v. Sannella*, 993 S.W.2d 73, 76 (Tenn. Ct. App. 1999)." **Bogan v. Bogan**, 60 S.W. 3d 721, 727 (Tenn. 2001). Our review of questions of law is *de novo* with no presumption of correctness attaching to the trial court's legal conclusions. **Brumit v. Brumit**, 948 S.W.2d 739, 740 (Tenn.Ct.App.1997).

IV.

Husband contends that the trial court erred in failing to terminate the award of alimony in toto. He concludes that two material changes of circumstance exist that warrant termination rather than a reduction in his alimony obligation. First, Husband notes a general change in circumstances – the reduction in his income occasioned by the loss of his long-

term, previous employment. Second, Husband contends that a statutory presumption was raised by the evidence, but not rebutted, that Wife is no longer in need of the alimony awarded to her in the divorce because other persons are supporting her now. We address these contentions in turn.

To begin, Husband unquestionably suffered a reduction in income. When the parties divorced, Husband was working substantial overtime – “just about every Saturday” – and earned \$50,000 a year. Just before he was terminated in July 2008, his hours had been cut and as a result his income had dropped to between \$25,000 - \$30,000. By the time Wife filed her petition for contempt, Husband was unemployed. At the time of the trial, Husband had found a new job that paid \$6.75 an hour. The trial court acknowledged Husband’s reduced income when it reduced Husband’s alimony payment to \$100 a week “based upon a material change in . . . wages. . . .” The court’s decision was in keeping with the well settled rule that a court may not modify or terminate a spousal support award unless it first finds that a substantial and material change in circumstances has occurred since the entry of the original support judgment. *See Bogan v. Bogan*, 721 S.W.3d at 727-28. The gist of Husband’s disagreement seems to be that, while the trial court correctly found a material change of circumstances based on his reduced income, it erred in not determining that his loss of income, together with Wife’s living arrangements, was substantial enough to justify the termination of his alimony obligation.

Husband points to Tenn. Code Ann. § 36-5-121(2005), the statute governing awards of spousal support. Regarding periodic alimony, the statute provides in relevant part as follows:

(f) (1) Alimony in futuro, also known as periodic alimony, is a payment of support and maintenance on a long term basis or until death or remarriage of the recipient. Such alimony may be awarded when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible, meaning that the disadvantaged spouse is unable to achieve, with reasonable effort, an earning capacity that will permit the spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

(2) (A) An award of alimony in futuro shall remain in the court's control for the duration of such award, and may be

increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances.

(B) In all cases where a person is receiving alimony in futuro and the alimony recipient lives with a third person, a rebuttable presumption is raised that:

(i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or

(ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

Relying on subsections (B)(i) and (ii) of the statute, Husband contends that Wife is no longer in need of periodic alimony – either because she could and should support herself and the others living with her, because the others supported her, or both. In his brief, Husband more bluntly states his position as follows:

[I]n her own words, [Wife] got by and she didn't need to work. Of course she didn't need to work with all the people in her home contributing to [the] payment of household expenses and the fact that she was getting over \$800.00 per month [in] alimony.

This court has addressed the applicability of the “living with a third person” language:

The statute has four levels of threshold inquiry:

(1) Is the alimony recipient “living with a third person”?

(2) Is the third person “contributing to the support of the alimony recipient”?

(3) Is the third person “receiving support from the alimony

recipient”?

(4) If the answer to (2) or (3) is “yes,” does this establish that “the alimony recipient . . . does not need the amount of support previously awarded”?

If the answer to (4) is “yes,” the court then proceeds to “suspend all or part of the alimony obligation of the former spouse.” The statute, in effect, mandates that there has been a change in circumstances if an alimony recipient “lives with a third person,” if the answer to question (2) or (3) is “yes,” and if, as a consequence of these findings, “the alimony recipient . . . does not need the amount of support previously awarded.”

Edwards v. Edwards, No. E2004-02490-COA-R3-CV, 2005 WL 2043580, * 2 (Tenn. App. E.S., filed Aug. 25, 2005).

At trial, the proof centered on Husband’s income and Wife’s living arrangements. As to the latter, the court heard that shortly after the divorce, Wife invited several other adults, together with their children, to share her home. Wife testified that at times, her girlfriend or the girlfriend’s children had paid or helped pay the utility bills, thereby prompting a “yes” to questions (1) and (2) in the statutory analysis. There was no evidence, however, that the answer to question (4) was also “yes.” Stated differently, the fact that the other adults in her home contributed to her support did not support a conclusion that Wife “did not need the amount of support previously awarded.” The proof also showed that Wife had zero income apart from the alimony she received from Husband, and, without these payments, she was unable to pay even for basic utility services. According to Wife, the couple that still remained in her home at the time of trial had delayed their plans to move into their own home in an effort to help support Wife until she began receiving her alimony payments again.

The trial court did not expressly address Husband’s claim that a statutory change of circumstances was established based on the “living with a third person” language of the statute. In its bench ruling, however, the trial touched on the issue of Wife’s need as follows:

Now, [in] regard to the alimony, you’ve had a substantial change in your financial circumstances. I don’t necessarily find it’s entirely willful. It’s unusual, after 34 years, to get fired in that manner, but your income has changed substantially, and so I’m going to reduced his alimony to a hundred dollars a week from the \$200 a week that was there, but I’m going to order you to

pay a hundred dollars a week on the arrearage because you had a substantial arrearage. And you're doing contract work. Alimony is a deductible thing to you. It's taxable to her, is she has to pay any taxes, and so I think you'll be in a position, even though you are only earning about \$1600 a month, if you work 20 days at \$81 a day, you've also testified you have someone who is also working in your home, your wife, and taking care of you or paying your bills. *Under the circumstances, [Wife] hasn't had the benefit of a job in 24 years prior to your divorce and the ten years since then. She has health problems and I don't know whether she's able to work, but I am going to require you to keep paying in the manner that I have.*

(Emphasis added). In our view, the trial court implicitly rejected Husband's claim that the evidence raised a statutory presumption that Wife no longer had a need for alimony because third persons lived with and had helped to support her. Clearly, the trial court found that Wife had a continuing need for and Husband had the ability to continuing paying periodic alimony. "[T]he two most important considerations in modifying a spousal support award are the financial ability of the obligor to provide for the support and the financial need of the party receiving the support." **Bogan**, 721 S.W.3d at 730 (citing, e.g., **Givler v. Givler**, 964 S.W.2d 902, 906 (Tenn. Ct. App. 1997)). The evidence does not preponderate against the trial court's findings.

Husband complains that the trial court's judgment meant that "[i]n essence, [Husband] would continue to pay a total of \$200.00 per week" despite his change in circumstances. While this was indeed the immediate effect of the court's ruling, it simply means the reduction that Husband was granted would be delayed for some 20 months plus it would take him to satisfy the undisputed \$8,000 alimony arrearage. The evidence does not preponderate against the trial court's finding that, at the time of the trial, Wife had a continuing need and Husband had the ability to pay alimony, as reduced, and at the same time satisfy the arrearage as ordered.

The evidence does not preponderate against the trial court's decision to reduce Husband's alimony obligation by 50 percent based on his reduced income. Furthermore, the evidence does not preponderate against the trial court's implicit ruling that a further reduction or termination of Wife's entitlement to alimony is not mandated by a statutory change of circumstances based upon Wife's sharing of her home with other adults. The trial court did not err in its modification of the alimony award.

V.

The judgment of the trial court is affirmed. This case is remanded to the trial court, pursuant to applicable law, for enforcement of its judgment and for the collection of costs assessed below. Costs on appeal are taxed against the appellant, Robert Keith.

CHARLES D. SUSANO, JR., JUDGE